RESPONSE REQUESTED

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Supreme Court U.S.
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No. 00-860

IN THE

SUPREME COURT of the UNITED STATES

CORRECTIONAL SERVICES CORP.,

Petitioner,

v.

JOHN E. MALESKO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a private corporation, operating a correctional facility under color of federal law, be held liable under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1997), for its violation of an inmate's constitutional rights?

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STATEMENT OF THE CASE

A. Factual Background

Le Marquis Community Corrections Center is a halfway house operated under a Bureau of Prisons contract by petitioner Correctional Services Corp. ("CSC"), a for-profit prison corporation. Respondent John Malesko was an inmate of Le Marquis who suffered from congestive heart failure. His condition required daily medication and made it unsafe for him to climb the five flights of stairs to his room.

Mr. Malesko routinely took his prescribed medication and CSC ordinarily allowed him to take the elevator. But on or about March 18, 1994, CSC knowingly refused/failed to provide Mr. Malesko the pills he needed to control his condition even though CSC knew that his supply was exhausted. On March 28, a CSC guard refused to allow him to take the elevator from the ground floor to his room, and threatened him with a return to prison unless Mr. Malesko reached his room in time for the head count. As he hurried up the stairs, Mr. Malesko suffered a heart attack and fell.

The fall injured his ear, causing a severe balance problem that has left him disabled.

CSC created no paperwork regarding Mr. Malesko's injury, the fact that an ambulance was called to transport him to the hospital, or anything to indicate that something had happened that day to Mr. Malesko. As Mr. Malesko was recovering from his injuries in hospital, a CSC employee told him it would have been better for all concerned if Mr. Malesko had died.

B. Decisions Below

Mr. Malesko filed this action pro se on March 27, 1997, in the United States District Court for the Southern District of New York claiming damages under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1997), against petitioner CSC and ten "John Doe" defendants. On February 2, 1999, Mr. Malesko by counsel filed an amended complaint naming Jorge Urena, the guard who denied him use of the elevator, as one of the John Doe defendants. CSC filed a motion to dismiss, which the district court granted on July 28, 1999. In that decision, the district court

held that because Mr. Malesko's identification of Mr. Urena in the amended complaint did not relate back to the filing of the original complaint, it was time-barred. Malesko v. Correctional Servs. Corp., No. 97 CIV 4080 (JSM), 1999 U.S. Dist. LEXIS 11403, 1999 WL 549003 (S.D.N.Y. July 28, 1999). [App. at 24a] With no explanation of its reasoning, the district court held that under Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471 (1994), a Bivens action can be maintained only against an individual. [App. at 21a.] Meyer in fact held only that no Bivens action lies against federal agencies.

The Second Circuit reversed as to CSC, but affirmed as to Mr. Urena. The panel held that a Bivens action may lie against private corporations acting under color of federal law. Such a cause of action serves the Bivens interests in remedying constitutional violations and in deterrence, by motivating the corporation to "prevent unlawful acts by its employees." Malesko v. Correctional Servs. Corp., 229 F.3d 374, 380 (2d Cir. 2000) [App. at 11a]. The court rejected CSC's argument

that Meyer controlled, observing that private corporations performing core governmental functions under contract with the federal government "are not the equivalent of federal agencies." Id. [at 10a] The panel further concluded that Meyer's reasons for limiting Bivens are inapposite here. A successful Bivens action against a private corporation can serve Bivens' compensatory and deterrence goals without jeopardizing the public purse.

REASONS FOR DENYING THE WRIT

This Court should deny review. First, the circuits are in substantial accord that a Bivens cause of action lies against a private corporation acting under color of federal law. This Court should follow its general rule and ascertain whether a conflict develops before reviewing the issue. Second, the Second Circuit's decision is consistent with this Court's Bivens precedents, and presents no plain error in need of correction. Finally, it is well-settled that private corporations are liable for their torts in state law, and when they engage in state action, they are also

liable under Bivens or 42 U.S.C. 1983. While the Bivens cause of action opens a federal forum to certain plaintiffs, CSC overstates its practical importance because it maintains insurance to defray its tort liability and plaintiffs can always seek state law remedies against private defendants. But the availability of Bivens remedies furthers the important objective of ensuring that where, as here, private parties assume core governmental functions for profit, they can be held accountable for their constitutional violations in federal court.

I. THERE IS NO SPLIT BETWEEN THE CIRCUITS.

The decision below is yet another link in a long chain of circuit precedent holding that a cause of action exists against private defendants acting under color of federal law. This settled rule has now been recognized in five circuits, including the Second. The Sixth Circuit recently addressed the same question in Hammons v. Norfolk Southern Corp., 156 F.3d 701 (6th Cir. 1998). There, a railroad employee whose private employer had tested him for drugs brought a Bivens

claim against the employer. The Sixth Circuit found that a Bivens cause of action was available.

Hammons itself simply elaborated the Sixth Circuit rule established twenty-three years earlier in Yiamouyiannis v. Chemical Abstracts Serv., 521 F.2d 1392 (6th Cir. 1975) (per curiam). In the 1980s, the Fifth, Ninth, and First Circuits also recognized that a private entity engaging in federal action may face Bivens liability. See Dobyns v. E-Systems, Inc., 667 F.2d 1219 (5th Cir. 1982) (private contractor providing personnel, materials and services to federal government); Schowengert v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987) (private corporation contracted to provide security services to Navy Department); Gerena v. Puerto Rico Legal Serv., Inc., 697 F.2d 447 (1st Cir. 1983) (acknowledging cause of action, but finding no government actor). These decisions are all still good law.

In attempting to demonstrate a circuit split, petitioner relies entirely on Kauffman v. Anglo-American School of Sofia, 28 F.3d 1223 (D.C. Cir.

1994). Kauffman is factually unique, and easily distinguishable from the present case. In Kauffman, "the entity at issue was arguably a federal government agency," Malesko, 229 F.3d at 380 n.3 [App. at 11a]; here, the defendant is a large private corporation operating a for-profit prison. The Kauffman defendant was an elementary school established and in part funded by the U.S. Department of State to educate the children of American and British diplomats stationed in Sofia, Bulgaria. Six members of the school's seven-member governing board were appointed by the American and British ambassadors, and all the American appointees were State Department employees. 28 F.3d at 1224.

In contrast, the only connection alleged between CSC and the government is contractual. CSC is a private, publicly traded, for-profit corporation that operates a halfway house for the Bureau of Prisons pursuant to contract. Unlike the quasi-governmental defendant in Kauffman, the defendant here cannot plausibly be portrayed as a government entity. Nor would a judgment against CSC take money from the public

fisc, the integrity of which was an important consideration in Kauffman, Meyer, and the decision below. Although the Kauffman panel never reached this question, it appears that liability in that case would have fallen on federal employees and perhaps in part on the State Department. However broadly the D.C. Circuit may have painted its holding, the facts of the cases are so different that the decisions cannot plausibly be said to conflict.

All the circuits to face the question presented are in agreement that cases like this may proceed. This Court should not strain to find conflict where none exists. If and when a circuit split develops, this Court can resolve it.

II THE SECOND CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S HOLDINGS IN BIVENS AND LUGAR V. EDMONSON OIL CO., 457 U.S. 922 (1982).

In Bivens, this Court recognized a cause of action for damages arising out of a federal agent's violation of constitutional rights while acting under color of his authority. This Court has also specifically held that a Bivens action may be grounded in failure to

provide a prisoner with medical attention. Carlson v. Green, 446 U.S. 14, 18-19 (1980), quoting Bivens, 403 U.S. at 396. There is no dispute here that CSC was acting under color of federal law. See, e.g., Pet. at 14. Nor is there any dispute that a Bivens cause of action would exist against CSC's officers as individuals.[1]

CSC's sole contention is that even though it was performing a core government function under contract with the federal government, its corporate status shields it from Bivens liability. There is simply no support for petitioner's claim, nor is there any policy reason why a private corporation should be permitted to stand in the government's shoes for the purpose of making a profit, but claim immunity from governmental liability when the corporation violates an individual's constitutional rights -- a violation made possible only because of the corporation's special status.

As this Court has explained, a Bivens action does

[1] CSC's position is that the question of its employees' liability is not presented. Pet. at 5 n.1.

not lie if defendants can show (1) "'special factors counseling hesitation in the absence of affirmative action by Congress,'" or (2) that Congress has explicitly provided a substitute remedy. Green, 446 U.S. at 18, quoting Bivens, 403 U.S. at 396. No suggestion has been made here that the latter exception applies. Nor are there any "special factors" here "counseling hesitation". In Meyer, this Court declined to find a Bivens cause of action against federal agencies for two reasons. First, the Court concluded that Bivens was founded on the premise that federal agencies could not be directly sued for constitutional violations. 510 U.S. at 485. Second, one of Bivens's "special factors" was present: "if we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government." Id. at 486.

Meyer's reasoning is wholly inapplicable here. A cause of action against CSC poses no threat to Bivens's bedrock assumptions. Nor would it create a financial threat to the federal government. Malesko, 229 F.3d at

379 [App. at 9a] ("claims against private corporations do not directly impact the 'federal purse' and thus do[] not implicate federal fiscal policy'") (quoting Hammons, 156 F.3d at 706). CSC would be liable for any award in this case, and CSC carries (per the Government's requirement) liability insurance for that very reason. Cf. Richardson v. McKnight, 521 U.S. 399, 407-12 (1997) (discussing different incentives facing privately-operated, rather than government, prison). Furthermore, CSC is exposed to its employees' liability and it is unimaginable that it has not agreed to indemnify its employees. See id. Indeed, during the course of the litigation, CSC acknowledged that it would indemnify the individuals.

This conclusion is further bolstered by this Court's 42 U.S.C. § 1983 jurisprudence. Courts often look to § 1983 law as a parallel to the Bivens action. See, e.g., Green, 446 U.S. at 18-20); Butz v. Economou, 438 U.S. 478, 500 (1978); see also Wilson v. Layne, 526 U.S. 603, 609 (1999). It is well settled that § 1983 establishes a cause of action against a private

corporation that violates the constitution under color of state law. Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982); see also Adickes v. S.H. Kress & Co., 398 U.S. 144, 171 (1970). The courts of appeals have correctly concluded that so does Bivens.

III. THE COURT BELOW CORRECTLY IMPOSED BIVENS LIABILITY ON THE PRIVATE OPERATOR OF A CORRECTIONAL FACILITY.

A private entity that steps into the shoes of government for profit should be held to constitutional standards. The privatization of core government activities -- such as law enforcement -- may save the government money, but should not erode constitutional protections against those acting under color of state law. As this Court observed in Bivens, "[a]n agent acting -- albeit unconstitutionally -- in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." 403 U.S. at 392. Nor should the government be permitted to hire corporations to do what the government itself may not.

Bivens, Meyer, and to some extent Kauffman

presented difficult policy questions about liability for wrongs committed by the sovereign and its officers, and the financial impact of that liability. These concerns are absent here. In every state, individuals may sue corporations for the torts they commit. In many states, including New York, private employers are liable for many of their employees' torts. See Riviello v. Waldron, 47 N.Y.2d 297, 304 (1979). More specifically, suits against private correctional facilities have a longstanding history, which this Court reviewed in McKnight, 521 U.S. at 404-07. McKnight not only accepted § 1983 liability for employees of private prisons, but held that they are not entitled to qualified immunity.

CSC has freely chosen to provide correctional services for profit, notwithstanding its exposure to liability for torts against its inmates. The government has likewise freely chosen to invest CSC with federal power. If the uniform circuit precedent imposing Bivens liability on private corporations were of any financial concern to the government, it could

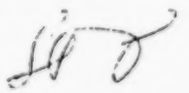
contract with another corporation or -- protected by Meyer and qualified immunity for its employees -- operate its own prisons. But the government cannot strip its citizens of constitutional protections by placing them in the physical custody of private corporations.

CONCLUSION

For the reasons set forth above, this petition should be denied.

Thank you for your courtesies.

Respectfully submitted,



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Dated: February 1, 2001

PROOF OF SERVICE

I hereby certify that on this date, I caused two copies of the brief in opposition to the petition and the motion to proceed in forma pauperis to be delivered via regular U.S. mail, postage pre-paid, upon Carter Phillips at Sidley & Austin, 1722 Eye Street, NW, Washington, DC 20006.

I hereby certify that the foregoing statement made by me is true. I am aware that if it is willfully false, I may be subject to punishment.

Dated: February 1, 2001

STEVEN PASTERNAK

01/31/2001 12:02 9729947931

No. 00-966

IN THE

SUPREME COURT OF THE UNITED STATES

[illegible] — PETITIONER
(Your Name)

VS.

[illegible] — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

N.Y FEDERAL COURT - PROSE

MALECKO VRS ESSMOR (THIS CASE

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

BEST AVAILABLE COPY

Jan. 31 2001 08:20PM P1

FROM :

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, JOHN E MALESKO, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ —	$	$ —	$
Self-employment	$ —	$	$ —	$
Income from real property (such as rental income)	$ —	$	$ —	$
Interest and dividends	$ —	$	$ —	$
Gifts	$ —	$	$ —	$
Alimony	$ —	$	$ —	$
Child Support	$ —	$	$ —	$
Retirement (such as social security, pensions, annuities, insurance)	$ 669.00 - 50 MED ICARE	$	$ 669.00 - 50.00 MED. CARE	$
Disability (such as social security, insurance payments)	$ —	$	$ —	$
Unemployment payments	$ —	$	$ —	$
Public-assistance (such as welfare)	$ —	$	$ —	$
Other (specify): _____	$ —	$	$ —	$
Total monthly income:	$ 669.00	$	$ 669.00	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ 5 dollars

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
✓ DELUXE BANK IOWA	Checking	$ 36.00	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 25% Rent	$
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100.00	$
Home maintenance (repairs and upkeep)	$ 10.00	$
Food	$ 200.00	$
Clothing	$ 20.00	$
Laundry and dry-cleaning	$ 20.00	$
Medical and dental expenses	$ 20.00	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 20.00	$
Recreation, entertainment, newspapers, magazines, etc.	$ 70.00	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$ None	$
Health	$	$
Motor Vehicle	$	$
Other: _____	$	$
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$ None	$
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$ None	$
Department store(s)	$	$
Other: _____	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify): _____	$	$
Total monthly expenses:	$ 819.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

BROKE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: JAN 30, 2001

John Malestro

(Signature)